would be charged with knowledge possessed by the majority of the directors, even if they did not disclose it to the minority, and acted with intent to serve their own interests and in disregard of the interests of the corporation.[16] The converse situation is illustrated by the recent case of *Western Securities Co.* v. *Silver King Consolidated Mining Co.*,[17] where the votes of the two directors who were acting to serve their own fraudulent scheme comprised only a minority and were not essential to produce the directorate action. Their knowledge was properly held not to be imputed to the corporation.

TRIAL OF CIVILIANS BY MILITARY COURTS IN TIME OF PEACE. — A federal court was recently faced with the problem of the jurisdiction of a military court over civilians. The governor of Texas had suspended the local officials, declared a state of martial law, and directed the militia to maintain law and order. The defendant was fined and, upon his refusal to pay, imprisoned by a military court for exceeding the speed limits fixed by ordinance. His petition for a writ of *habeas corpus* was denied by the federal court and the jurisdiction of the military court upheld as a proper exercise of martial law.[1]

Martial law in its correct sense is simply the will of the military commander of a territory exercised in accordance with the usages of war.[2] It corresponds in a way to what in France and other continental countries is called a state of siege.[3] Where it exists the functions of the civil tribunals are or may be suspended and for the time vested in the military arm of the state. And just as the régime of the civil law is both preventive and punitive so also is that of martial law.[4] Our problem is to determine whether there is a place in our constitutional system for martial law in this sense apart from actual war.

Martial law must be sharply distinguished from the common-law power of a sovereign, — sometimes called qualified martial law,[5] — to employ all force necessary to meet opposition to the law of the land.[6] By virtue of that power the state may in time of disturbance call upon the militia to help maintain the orderly administration of the law by dispersing mobs, quelling riots, safeguarding life and property, and arresting and detaining persons obnoxious to the safety of the community.[7] Indeed the proper authorities must, when the occasion arises, so

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[16] See Lyne *v.* Bank of Kentucky, 5 J. J. Marsh. (Ky.) 545, 559 (1831).

[17] 192 Pac. 664 (Utah). See RECENT CASES, p. 674, *infra*.

[1] United States *ex rel.* McMaster *v.* Wolters, 268 Fed. 69 (1920). For a statement of the facts in this case see RECENT CASES, p. 673, *infra*.

[2] See GLENN, THE ARMY AND THE LAW, 157, 158.

[3] See DICEY, LAW OF THE CONSTITUTION, 8 ed., 287.

[4] See GLENN, *supra*, 166.

[5] See Commonwealth *v.* Shortall, 206 Pa. 165, 55 Atl. 952 (1903).

[6] See DICEY, *supra*, 284; see Holdsworth, "Martial Law Historically Considered," 18 L. Q. REV. 117, 128. See BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW, 433.

[7] Luther *v.* Borden, 7 How. (U. S.) 1 (1849); Druecker *v.* Salomon, 21 Wis. 621 (1867); *In re* Boyle, 6 Ida. 609, 57 Pac. 706 (1889); Commonwealth *v.* Shortall, *supra; In re* Moyer, 35 Colo. 159, 85 Pac. 190 (1905); Moyer *v.* Peabody, 212 U. S. 78 (1909);

use the militia.[8] But the militia so employed is merely acting the preventive, defensive rôle of martial law. The present question is whether the sovereign in time of peace can go a step further, proclaim absolute martial law, and thus authorize the militia to adopt the punitive rôle and subject those civilians taken in custody to military trial.

In England an answer in the negative may safely be ventured.[9] In the United States the authorities are not of one mind.[10] On the one hand it has been held that in time of local insurrection the military summoned by the governor are in control to the exclusion of the civil authorities [11] and that the military tribunals have jurisdiction to try and punish civilians.[12] The reasons given are that there is a *de facto* state of war,[13] the continued session of the civil courts notwithstanding;[14] that motives of fear or favor render the ordinary civil processes ineffective or entirely inoperative; that the necessity of the situation demands summary action and justifies the temporary dethronement of the constitutional guarantees in order to hasten the restoration of the sovereignty of the law; that in time of need executive process is due process.[15]

On the other hand it has been held [16] that the declaration of the governor that a state of insurrection exists in a given district does not create a new legal situation,[17] but that it is merely the recognition of an existing state of affairs [18] which calls for the exercise of the state's reserve police force. The militia may be called out simply to restore order, to suppress but not to punish.[19] A riot or insurrection is not

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State *v.* Brown, 71 W. Va. 519, 77 S. E. 243 (1912); *Ex parte* Jones, 71 W. Va. 567, 77 S. E. 1029 (1913); *Ex parte* McDonald, 49 Mont. 454, 143 Pac. 947 (1914); Hatfield *v.* Graham, 73 W. Va. 759, 81 S. E. 533 (1914).

[8] Rex *v.* Kennett, 5 C. & P. 282 (1781); Rex *v.* Pinney, 5 C. & P. 254 (1832).

[9] See 3 COKE'S INSTITUTES, 52; 1 HALE, P. C., 500; 1 HALE, HISTORY OF THE COMMON LAW, 5 ed., 55; DICEY, *supra*, 281–283, 289, 544; F. Pollock, "What is Martial Law," 18 L. Q. REV. 152–158.

[10] See State *v.* Brown, *supra*; *Ex parte* McDonald, *supra*. See G. S. Wallace, "The Need, the Propriety, and the Basis of Martial Law," 8 JOUR. OF CRIM. LAW AND CRIMINOLOGY, 167–189; H. J. Hershey, "Power and Authority of Governor and Militia in Domestic Disturbances," 19 LAW NOTES, 28–33; GLENN, *supra;* A. C. VANDIVER, MARTIAL LAW; A. J. Lobb, "Civil Authority *versus* Military," 3 MINN. L. REV. 105, 111; 2 WINTHROP'S MILITARY LAW AND PRECEDENTS, 2 ed., 1274. For suggestions as to legislation on the subject, see H. W. Ballantine, "Qualified Martial Law, a Legislative Proposal," 14 MICH. L. REV. 102, 197.

[11] State *v.* Brown, *supra; Ex parte* Jones, *supra*. See Commonwealth *v.* Shortall, *supra*, 172, 173.

[12] State *v.* Brown, *supra*. See *Ex parte* Jones, *supra*, 574. See 15 COL L. REV. 177; 26 HARV. L. REV. 636.

[13] See *Ex parte* Jones, *supra*, 605; Commonwealth *v.* Shortall, *supra*, 171, 172, 174.

[14] *Ex parte* Marais, 1902 A. C. 109, is not an authority for this proposition. There a war was in progress. The court merely held that in view of the large-scale operations of modern warfare it was reasonable to treat the territory in question as though actually within the zone of battle. See C. Dodd, "*Ex parte* Marais," 18 L. Q. REV. 147. *Cf. Ex parte* Milligan, 4 Wall. (U. S.) 2, 121 (1866).

[15] State *v.* Brown, *supra*.

[16] *Ex parte* McDonald, *supra*.

[17] See Holdsworth, *supra*, 129.

[18] See Cushing, 8 OPINIONS OF ATTORNEY GENERALS 374.

[19] See *Ex parte* Milligan, *supra*, 121. See GLENN, *supra*, 157–190; A. C. VANDIVER, *supra*, 13; E. M. Cullen, "The Decline of Personal Liberty in America," 48 AM. L. REV. 345, 346, 352. In Moyer *v.* Peabody, *supra*, holding that custody by the military authorities during the period of disturbances is warranted, there is some broad lan-

war.[20] The existence of either does not, therefore, put the citizens of the affected area beyond the pale of the law.[21] The authority to call troops out for police purposes and to employ any amount of force necessary to abate the disorder is adequate to meet all needs. A reasonable belief on the part of the military authorities that a man should be kept in custody during the period of disorder is a sufficient answer to a petition for a writ of *habeas corpus*.[22] If local officials fail in their duty there are legal ways for replacing them with others. If juries will not convict, a change of venue may be had. The Petition of Right [23] was leveled at military trial of civilians in time of peace. Its substance is found in our federal and state constitutions,[24] — the latter often providing expressly that the military shall at all times be subordinate to the civil authorities.[25] The governor in calling out the militia acts as the chief civil officer of the state [26] by virtue of his constitutional power to enforce the law, but in the absence of constitutional authority he has no power to create courts which have no standing in our judicial system or to suspend the law of the land.[27] To imply such a power would be to fly in the face of the constitutional history of England and the United States. Finally, while the decision in *Ex parte Milligan* [28] rests on a statute [29] it contains a strong *dictum* that military courts have no jurisdiction over civilians beyond the zone of actual war.[30]

The validity and force of most of the arguments on either side depend upon the extent and duration of the disorder. But even if there is a very extensive and protracted insurrection it is doubtful if such serious constitutional objections could be overcome. In view of the frequency of local disturbances where the militia is called out and of the magnitude of the public interests concerned the problem involved in *United States*

guage which offhand would seem *contra*. But this language must be considered as bearing only upon the particular question involved and as limited by the following *dictum* (p. 85): "Such arrests are not necessarily by way of punishment but are by way of precaution to prevent the exercise of hostile power." See Commonwealth *v.* Shortall, *supra*, 170, "It [martial law] was put in force only as to the preservation of public peace and order not for the ascertainment or vindication of private rights or the other ordinary functions of government." See *In re* Moyer, *supra*, 167, where the court is careful to add, "He was not tried by any military court, or denied the right of trial by jury, neither is he punished for violation of the law nor held without due process of law."

[20] *Ex parte* McDonald, *supra*.

[21] See F. Pollock, *supra*, 157; BIRKHIMER, *supra*, § 437.

[22] Moyer *v.* Peabody, *supra; In re* Moyer, *supra*; *In re* Boyle, *supra; Ex parte* Jones, *supra*.

[23] See 3 CHAS. I, c. 1, especially § 7; 5 STATUTES OF THE REALM, 24.

[24] See TEXAS CONSTITUTION, Art. I, §§ 10, 12, 15, 19, 20, 28.

[25] See TEXAS CONSTITUTION, Art. I, § 24. The constitution of every state in the union, except New York, provides for subordination of the military to the civil power. See STIMSON, FEDERAL AND STATE CONSTITUTIONS, § 292.

[26] *Ex parte* McDonald, *supra;* Ela *v.* Smith, 5 Gray (Mass.), 121 (1855); Franks *v.* Smith, 142 Ky. 232, 134 S. W. 484 (1911); *In re* Moyer, *supra*, 168.

[27] See *Ex parte* Milligan, *supra*, 121.

[28] See note 14, *supra*.

[29] See 12 STAT. AT L. 755.

[30] It is true that Amendments V and VI of the Federal Constitution discussed in *Ex parte* Milligan are limitations solely upon the federal government. None the less the interpretation placed upon them certainly carries weight in construing state constitutions containing similar provisions.

v. *Wolters* [31] is one of great importance. A decision by the United States Supreme Court upon the problem would do much to clear up a doubtful situation.

DAMAGES FOR LOSS OF PROSPECTIVE CROPS. — "Although by performance the benefits of the contract would accrue at a future time, yet upon a breach by which such future advantages will be prevented, the injured party may immediately thereafter recover damages equivalent to the loss." [1] To deny that there is any case, where such an equivalent can be determined, would be, in the words of Sir George Jessel, M. R., "to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is known as the other side of Westminster Hall." [2] Yet in the recent case of *Turpin* v. *Jones* [3] the court denied recovery of damages because they involved the calculation of the probable value of crops to be raised in the future. In that case the contract was for the cultivation of land upon shares. The owner of the land refused to allow the plaintiff to enter; suit was brought immediately, and before any of the season's crop had been raised, or even planted, in the neighborhood. A demurrer to the petition was sustained on the ground that damages were too conjectural.

The purpose of the law in awarding damages for breach of contract is "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." [4] The basic principle is thus compensation.[5] To determine the proper amount of compensation, the courts have adopted various tests, or measures of damage, based upon the value of various factors involved in the performance contracted for. In these crop cases the most usual test is the value of the plaintiff's share of the crop, less what he might reasonably have earned in other employments during the period of the contract.[6] Some courts take the measure of damage to be the value of the plaintiff's share, less the value of the labor he was required to perform; [7] others take the value of the lease or contract, *i. e.*, the profits to be derived therefrom.[8] The usual evidence upon which the value of the crop is computed is that of the average yield of adjoining lands, and the market price, in the same year.[9] But this is only one of the several kinds of evidence upon which the probable value

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[31] See note 1, *supra*.

[1] SUTHERLAND, DAMAGES, 4 ed., § 107.

[2] Fothergill *v.* Rowland, 17 Eq. 132 (1873).

[3] 225 S. W. 465 (1920). See RECENT CASES, p. 675, *infra*.

[4] WILLISTON, CONTRACTS, § 1338.

[5] See SEDGWICK, DAMAGES, 9 ed., §§ 29, 30; SUTHERLAND, DAMAGES, 4 ed., § 12.

[6] Somers *v.* Musolf, 86 Ark. 97, 109 S. W. 1173 (1908); Crews *v.* Cortez, 102 Tex. 111, 113 S. W. 523 (1908).

[7] Lindley *v.* Dempsey, 45 Ind. 246 (1873); Harrell *v.* Johnson, 93 Kan. 119, 143 Pac. 411 (1914).

[8] Cull *v.* San Francisco & F. Land Co., 124 Cal. 591, 57 Pac. 456 (1898); Taylor *v.* Bradley, 39 N. Y. 129 (1868); Cornelius *v.* Little, 52 Pa. Super. Ct. 394 (1913). See SEDGWICK, DAMAGES, 9 ed., § 624.

[9] U. S. Smelting Co. *v.* Sisam, 191 Fed. 293 (1911); International Agr. Corp. *v.* Abercrombie, 184 Ala. 244, 63 So. 549 (1913); Teller *v.* Bay, etc. Dredging Co., 151 Cal. 209, 90 Pac. 942 (1907).